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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

JOHN WILLIAM WEAVER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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No. 705

JOHN WILLIAM WHALEY, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was convicted by a jury, in the United States District Court for the Southern District of California, of impersonating an agent of the Federal Bureau of Investigation, in violation of 18 U.S.C. 912 (R. I, 2; 16). He was sentenced to imprisonment for three years, but execution of the sentence was suspended and he was placed on probation for five years (R. I, 20; Pet. App. 13). On appeal (R. I, 22-23) the conviction was affirmed (Pet. App. 14-21). The judgment of the court of appeals was en-

tered on November 12, 1963. The petition for a writ of certiorari was not filed until December 26, 1963 and is therefore out of time under Rule 22-2 of this Court. The issues raised in the petition do not in any event merit review by this Court.

Evidence for the government showed that on March 13, 1962 petitioner came to the door of Mr. Reedy's home in San Diego, stated he was a special investigator, and asked for the address of Mr. Durbin, Reedy's father-in-law (R. II, 4-6). Reedy asked if petitioner had come in connection with defaulted payments on Durbin's car, but petitioner stated that his mission was not repossession of the car. Reedy stated that even if he did know where Durbin was, he would not tell petitioner (R. II, 6-7). Mrs. Reedy then came to the door and permitted petitioner to enter the house when he displayed a badge (R. II, 7, 69). When petitioner asked Reedy if he knew it was a federal crime to transport a car across a state line, Reedy answered that the seller of the car knew that Durbin worked for the federal government in different states (R. II, 8). Petitioner said that the place where Durbin had bought the car "had turned the matter over to us" (R. II, 9). Petitioner asked Reedy if he knew he could get in trouble by withholding information (R. II, 12). When asked for his credentials petitioner handed to Reedy a leather folder, in which Reedy observed a gold badge and a card about 2½ inches wide by 3½ inches long in which petitioner's picture appeared in the lower left-hand corner. The card also had petitioner's name, address, height, weight, and color of eyes typed on it, and the

bottom of the card read "Federal Bureau of Investigation" (R. II, 9-10). Reedy identified Gov. Ex. 1, as being similar in size to this card, but stated that it was not the same card (R. II, 11). While Reedy held petitioner's credentials, he told his wife that "the gentleman was from the FBI and that we might as well tell him, because regardless, he was going to find out" (R. II, 11-12, 73, 90). Mrs. Reedy looked at the credentials, left the room, and obtained a letter which contained Durbin's post office box address, which she then related to petitioner (R. II, 12-13). After petitioner obtained this information, Mrs. Reedy asked how he would communicate with Durbin. Petitioner answered that "they" would send Durbin a telegram and have him get in touch with "our" office, and that by the time "we" get in touch with people in cases like this "the charges are dropped" (R. II, 13-14). Petitioner's employer was paid $15.00 by a bank for Durbin's address; of this amount petitioner received $9.00 (R. II, 201-202).

The government was permitted to introduce evidence of two similar acts by petitioner for the limited purpose of showing his intent and state of mind at the time of the alleged impersonation (R. II, 99-101, 116, 248-249). On August 30, 1961, shortly after

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[1] Gov. Ex. 1, taken from petitioner at the time of his arrest by an FBI agent on June 29, 1962, was an identification card with petitioner's picture, vital statistics and "National Bureau of Investigation" imprinted on it (R. II, 63, 64). Petitioner's credentials as an insurance investigator were of the same general type and similar in size to those used by FBI agents (R. II, 16).

petitioner's partner had driven off with a repossessed boat taken from the vicinity of the apartment of one Gonzalez, petitioner told Gonzalez he was from the Federal Bureau of Investigation and showed him a card when Gonzalez asked to see his credentials (R. II, 94-97, 103). On January 11, 1962, in repossessing the Thunderbird car of one Williams, petitioner flashed a badge and card at Williams and stated "National City Police" (R. II, 116-121).

In testimony given on his own behalf, petitioner stated that he showed the Reedys Gov. Ex. 1 (the National Bureau of Investigation identification card) and his investigator's badge, but that he did not have with him a card or badge identifying him as a member of the FBI (R. II, 198-200). Petitioner testified that it was after (not before) Mrs. Reedy had given the information as to Durbin's address that Reedy said to his wife, "Honey, you had to tell him. He is from the FBI" (R. II, 201). As to the two incidents involving repossessions, petitioner denied that he represented to Gonzalez that he was a member of the FBI (R. II, 214) and that he identified himself to Williams as a member of the National City Police Department (R. II, 209-210).

1. The sufficiency of the evidence is not an issue warranting review by this Court. The jury had a right to credit the testimony of Mr. and Mrs. Reedy that petitioner informed them that a possible federal crime by Durbin was involved, admonished that they could get in trouble by withholding information, and displayed his badge and an identification card bearing the legend "Federal Bureau of Inves-

tigation". This was a false representation by petitioner that he was an FBI agent, even though there is no testimony that petitioner expressly claimed this status. Petitioner, according to the testimony, was aware that the Reedys believed he was an FBI agent, yet did nothing to correct this belief. By reason of his false pretense, petitioner obtained Durbin's address—a thing of value—imparted this information to his employer and received a fee for his services. Thus a clear violation of the statute resulted.

2. Evidence as to the two prior similar law officer impersonations was relevant and material in explaining the intent with which petitioner committed the act charged against him in the indictment. *Nye & Nissen v. United States*, 336 U.S. 613, 618; 2 Wigmore on *Evidence* (3rd Ed. 1940) §§ 302-304. By instructions given both at the time this evidence was admitted and in its charge, the court properly limited this evidence to the question of petitioner's intent (R. II, 99-101, 116, 248-249). The two transactions were not too remote in point of time, the earlier one having occurred only about 6½ months prior to the offense charged.

3. There is no merit to petitioner's contention that certain parts of the court's charge to the jury were erroneous.

a. Petitioner quotes part of the court's charge (Pet. 7-8) as implying that intent and motive are synonymous. The omitted part of the charge, appearing between the two quoted excerpts, reads (R. II, 247, lines 8-10):

> Now, intent and motive are never to be confused. Motive is that which prompts a person to act. Intent refers only to the state of mind with which an act is done or omitted.

b. There is no valid ground for complaint as to the part of the charge (R. 243) directing the jury to consider "the manner in which each witness might be affected by the verdict" (Pet. 9-10). Petitioner's interest in the outcome was a proper factor for the jury to consider in determining his credibility.

c. The judge's general explanation of the purpose of the statute (R. II, 251, Pet. 8-9) did not imply that a conviction was possible even if the accused had not falsely pretended to be a federal officer. Moreover, shortly thereafter, he set out the three essential elements which must be proved (R. II, 252):

> First: The act or acts of falsely pretending to be an officer or employee acting under the authority of the United States;
>
> Second: Demanding or obtaining some thing of value while acting in such pretended character; and
>
> Third: Doing such act or acts knowingly and wilfully with the intent to deceive or to defraud another.

d. Before the jurors returned their verdict, they sent a written communication asking for the court's interpretation of "(a) letting the impression stand that he is a FBI man; (b) falsely pretending" (R. II, 259). The court then gave the jury examples of how a person might falsely pretend to be another by reason of what he was wearing or carrying, or by

reason of his actions, without making a verbal statement. The court also explained that the crux of the matter was not whether the petitioner intended to deceive the Reedys into believing he was an FBI agent when he left their house, but whether he intended to deceive them in order to induce them to give the information sought (R. II, 260-264). Later, after the court had discussed the question of false pretense with counsel, the jury was recalled (R. II, 265). After stating that by the time petitioner left the house he knew that the Reedys thought he was an FBI officer, the court charged (R. II, 266-267):

> But the question in your minds, the crucial thing is, when was there any false pretense, if there was? When did the defendant, with guilty intent, create that impression, if he did? He might not have created it with a guilty mind at all. But in order to be guilty of this crime, he must have the guilty state of mind in endeavoring to get the thing of value, namely, the information. He must have the criminal intent at that time, at the time he seeks the information, and gets that information. That's the crucial time. And that is what I wanted to emphasize.

The court then asked if there were anything further and both petitioner's counsel and government counsel stated "Nothing further" (R. II, 267). The quoted excerpt is a correct statement of the law; it required a finding of petitioner's criminal intent at the time he sought and obtained the information through the ruse of his false pretense.

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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